

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DUANE M. MILLER and LAVONNE
A. MILLER,

Plaintiffs,

v.

CHARLES A. MYERS; DANIEL A.
HALLY; MICHAEL WHORTON;
WASHINGTON STATE DEPARTMENT
OF FISH AND WILDLIFE; and
ASOTIN COUNTY,

Defendants.

NO. CV-10-360-EFS

**ORDER GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY JUDGMENT,
DISMISSING COMPLAINT, AND
CLOSING FILE**

Before the Court, without oral argument, are Defendants Charles Myers, Michael Whorton, and the Washington State Department of Fish and Wildlife's (collectively, "State Defendants") Motion for Summary Judgment, ECF No. [54](#), Defendants Daniel Hally and Asotin County's (collectively, "County Defendants") Motion for Summary Judgment, ECF No. [59](#), and the State Defendants' Motion to Join Asotin County's Motion to Dismiss Lavonne Miller, ECF No. [71](#). After reviewing the parties' submissions, applicable authority, and the record in this matter, the Court is fully informed. For the reasons discussed below, the Court grants Defendants' motions, dismisses Plaintiffs' Complaint, and closes the file in this matter.

1 **I. Background¹**

2 The facts giving rise to this lawsuit are largely undisputed. On
3 the morning of October 25, 2008, the opening day of Washington's modern-
4 firearm elk hunting season, Plaintiffs Duane and Lavonne Miller
5 (collectively, "the Millers") were sitting in a pickup truck. With Mr.
6 and Mrs. Miller was Don Sullivan, a friend of the couple's. The trio was
7 parked on property owned by Mrs. Miller's family in an area known for
8 hunting off of Cloverland Road in Asotin County, Washington. The pickup
9 was parked so that its rear faced a tree to the east and its front faced
10 an open area to the west.

11 Washington Department of Fish and Wildlife Officer Charles Myers and
12 Asotin County Deputy Sheriff Daniel Hally were patrolling the area
13

14 ¹ The State Defendants filed a Joint Statement of Uncontroverted
15 Facts in relation to their motion, which the Court takes as true for
16 purposes of drafting this background section. ECF No. [87](#). When
17 considering this motion and drafting this background section, the Court:
18 1) took as true all undisputed facts; 2) viewed all evidence and drew all
19 justifiable inferences therefrom in Plaintiffs' favor; 3) did not weigh
20 the evidence or assess credibility; and 4) did not accept assertions that
21 were flatly contradicted by the record. See *Scott v. Harris*, 550 U.S.
22 372, 380 (2007); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255
23 (1986). Quotations and disputed facts are supported by citation to the
24 record, while undisputed facts are set forth without reference to an ECF
25 number.
26

1 together. Officer Myers and Deputy Hally noticed the pickup truck in
2 which the Millers were seated and approached in their own vehicle to
3 conduct a field inspection. Officer Myers stepped out of his vehicle and
4 asked Mr. Miller "How's the hunting? Have you seen anything yet?"
5 Miller Decl., ECF No. [78](#) Ex. A ¶ 12; Clemmons Decl., ECF No. 67-[1](#) at
6 32:20-21. Mr. Miller, whose driver's side window had been rolled down
7 before the officers arrived, answered "We are not hunting." Miller
8 Decl., ECF No. [78](#) Ex. A ¶ 13; Clemmons Decl., ECF No. 67-[1](#) at 32:21.
9 Officer Myers asked Mr. Miller what he was doing, to which Mr. Miller
10 responded that he was investigating a group of potential trespassers he
11 had seen on the property earlier that morning.

12 Officer Myers approached the pickup truck and twice asked Mr. Miller
13 for his name, to which Mr. Miller retorted "What is your name?" Miller
14 Decl., ECF No. [78](#) Ex. A ¶ 18. Officer Myers responded that the badge on
15 his chest bore his name, and moved some of his equipment aside to show
16 Mr. Miller. At no time did Mr. Miller comply with Officer Myers' request
17 that he identify himself. Clemmons Decl., ECF No. 67-[1](#) at 33:22-23; *id.*
18 at 34:19-23.

19 Now at the window of the pickup, Officer Myers noticed that a rifle
20 sat just to Mr. Miller's right, its muzzle pointed toward the floorboard
21 of the truck. A spotting scope of the kind typically used for hunting
22 rested on the dashboard of the pickup truck, and Mr. Miller had a pair
23 of binoculars around his neck. Officer Myers asked Mr. Miller to open
24 the rifle's breech so that he could see whether it was loaded, and before
25 Mr. Miller could respond, demanded a second time to see the rifle's
26 breech. Mr. Miller responded either "I'm not going to until you answer

1 some questions first" or "I'm not going to - until you answer a few of
2 my questions." Compare Clemmons Decl., ECF No. 67-1 at 35:8-9 with
3 Miller Decl., ECF No. 78 Ex. A ¶ 22.

4 At this point, Officer Myers became concerned about his safety and
5 ordered Mr. Miller to exit the vehicle. When Mr. Miller did not
6 immediately comply, Officer Myers opened the pickup's driver-side door,
7 grabbed Mr. Miller's left arm, and twisted it behind Mr. Miller's back
8 in a "hammerlock" position. Officer Myers attempted to pull Mr. Miller
9 from the vehicle, causing Mr. Miller to drop the coffee mug he held in
10 his right hand and grab the steering wheel. Deputy Hally rushed to the
11 pickup and succeeded in wresting the steering wheel from Mr. Miller's
12 right hand. When Mr. Miller released the steering wheel, the force of
13 the struggle caused him to fall to the ground face-first; Mr. Miller
14 suffered injuries to his face, chest, and shoulder and a break to his
15 four-tooth dental bridge. Mr. Miller's nose was "gushing" blood and left
16 a small pool of blood on the ground. Miller Decl., ECF No. 78 Ex. A ¶
17 31. While on the ground, Mr. Miller received a sharp blow to his lower
18 back and felt his face being pushed into the gravel. Id. Mr. Miller
19 did not have any physical contact with the officers before or after their
20 struggle to extricate him from his vehicle and handcuff him. Clemmons
21 Decl., ECF No. 67-1 at 123:2-7. The interaction between Mr. Miller and
22 the officers lasted a total of twenty to forty seconds from when Officer
23 Myers initially asked how the hunting was until Mr. Miller was pulled
24 from the truck. Id. at 118:23-24.

25 The officers handcuffed Mr. Miller and placed him in the back of
26 their truck, and after seizing Mr. Miller's rifle and recording the

1 witnesses' names and dates of birth, left the scene. The officers met
2 an ambulance on Cloverland Road and transferred Mr. Miller to paramedics,
3 who transported him to Tri-State Memorial Hospital in Clarkston,
4 Washington. Mr. Miller was released at his own request and was picked
5 up sometime later that day by Mr. Sullivan and two other friends.

6 Mr. Miller was cited for unlawful avoidance of field inspection,
7 unlawful interference with department operations, obstructing a law
8 enforcement officer, and resisting arrest. These misdemeanor and gross
9 misdemeanor charges proceeded to trial and Mr. Miller was acquitted by
10 a jury in Asotin County District Court.

11 Proceeding pro se, Mr. and Mrs. Miller filed suit against Officer
12 Myers, Deputy Hally, Washington State Department of Fish & Wildlife
13 Captain Michael Whorley, the Department of Fish and Wildlife, and Asotin
14 County on October 14, 2010. ECF No. [1](#). On December 8, 2010, the Millers
15 filed an Amended Complaint. ECF No. [8](#). Construed liberally, Mr. and
16 Mrs. Miller's Amended Complaint alleges § 1983 claims for illegal search
17 and seizure and excessive force, in addition to state-law claims for
18 false arrest, false imprisonment, malicious prosecution, assault and
19 battery, and negligent training and supervision.² The State Defendants
20

21 ² In their Response to Defendants' Statement of Material Facts in
22 Support for Summary Judgment, the Millers further assert that "Civil
23 Rights at issue in this action are the Second, Fourth, Fifth, Sixth, and
24 Fourteenth Amendments to the United States Constitution." ECF No. [76](#) at
25 2. However, the Millers have not plead claims relating to violation of
26 their Second, Fifth, or Sixth Amendment rights, and even construed

1 and the County Defendants now each move for summary judgment on all of
2 the Millers' claims.

3 **II. Discussion**

4 **A. Summary Judgment Standard**

5 Summary judgment is appropriate if the record establishes "no
6 genuine issue as to any material fact and the movant is entitled to
7 judgment as a matter of law." Fed. R. Civ. P. 56(a). The party opposing
8 summary judgment must point to specific facts establishing a genuine
9 issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S.
10 317, 324 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475
11 U.S. 574, 586-87 (1986). If the nonmoving party fails to make such a
12 showing for any of the elements essential to its case for which it bears
13 the burden of proof, the trial court should grant summary judgment to the
14 moving party with regard to that claim. *Celotex Corp.*, 477 U.S. at 322.

15 When considering a motion for summary judgment, the Court does not
16 weigh the evidence or assess credibility; instead, "the evidence of the
17 non-movant is to be believed, and all justifiable inferences are to be
18 drawn in his favor." *Anderson*, 477 U.S. at 255. This does not mean that
19 the court accepts as true assertions made by the non-moving party that
20 are flatly contradicted by the record. *See Scott*, 550 U.S. at 380.

21 //

22 /

23 _____
24 liberally, this bare statement does not set forth a plausible claim for
25 relief. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (citing *Bell Atl.*
26 *Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

1 **B. Analysis**

2 Both groups of Defendants have moved for summary judgment on all of
3 the Millers' claims. Because the arguments raised by the State
4 Defendants' Motion for Summary Judgment, ECF No. [54](#), and the County
5 Defendants' Motion for Summary Judgment, ECF No. [59](#), overlap
6 considerably, the Court addresses both motions simultaneously.

7 **i. § 1983 Search and Seizure Claim**

8 The Millers have asserted a § 1983 claim for violation of their
9 Fourth Amendment right to be free from unreasonable searches and
10 siezures. To assert a cognizable claim under 42 U.S.C. § 1983, a
11 plaintiff must demonstrate that a person acting under color of state law
12 violated a right conferred on the plaintiff by the United States
13 Constitution or a federal statute. *Hartman v. Moore*, 547 U.S. 250, 254
14 n.2 (2006). Government officials are entitled to qualified immunity from
15 § 1983 claims so long as the right they have violated is not "clearly
16 established." *Camreta v. Greene*, 131 S.Ct. 2020, 2030-31 (2011).

17 Here, the Court need not determine whether Officer Myers and Deputy
18 Hally are entitled to qualified immunity because on the record before it,
19 it is clear that the Millers' Fourth Amendment rights were not violated.
20 Under *Terry v. Ohio* and its progeny, law enforcement officers may conduct
21 an investigatory stop of a person or vehicle if they have a "reasonable
22 suspicion that criminal activity is afoot." *United States v. Willis*, 431
23 F.3d 709, 714 (9th Cir. 2005) (citing *United States v. Arvizu*, 534 U.S.
24 266, 273 (2002)); see also *Terry v. Ohio*, 392 U.S. 1, 26-27 (1968). An
25 officer's reasonable suspicion must be a "particularized and objective
26 basis for suspecting legal wrongdoing," and whether reasonable suspicion

exists is judged under the totality of the circumstances. *Arvizu*, 534 U.S. at 273 (internal quotation omitted). In this case, the undisputed facts that Mr. Miller was parked in an area known for hunting, had a spotting scope and a pair of binoculars, and had a hunting rifle within arm's reach, coupled with his refusal to respond to Officer Myers' legitimate requests that he identify himself and open the breech of the rifle, gave Officer Myers a reasonable suspicion that he could be committing the crime of unlawful hunting of big game. See RCW 77.15.410(1) ("A person is guilty of unlawful hunting of big game in the second degree if the person . . . [h]unts for . . . big game and the person does not have and possess all licenses, tags, or permits required under this title."). Based on this suspicion, Officer Myers detained Mr. Miller for roughly twenty to forty seconds. During that time, Mr. Miller gave Officer Myers probable cause to believe he had committed a misdemeanor, and the investigative stop progressed to a full arrest. See II.B.iii., *infra*. And the officers' search of the vehicle and seizure of the gun, which occurred after Mr. Miller's arrest, are exempt from the Fourth Amendment's warrant and probable cause requirements as a "search incident to arrest." See *Arizona v. Gant*, 556 U.S. 332, 338-39 (2009). Accordingly, the Court finds that Mr. Miller's Fourth Amendment rights were not violated, and grants Defendants' motion in this regard.

ii. § 1983 Excessive Force Claim

The Millers have also asserted a § 1983 claim for excessive force, alleging that Officer Myers and Deputy Hally used excessive force when they knocked him headlong to the ground.

/

1 The Fourth Amendment requires police officers making an arrest to
2 use only an amount of force that is objectively reasonable in light of
3 the circumstances. *Tennessee v. Garner*, 471 U.S. 1, 7-8 (1985).
4 "Neither tackling nor punching a suspect to make an arrest necessarily
5 constitutes excessive force," but "even where some force is justified,
6 the amount actually used may be excessive." *Blankenhorn v. City of*
7 *Orange*, 485 F.3d 463, 477 (9th Cir. 2007) (internal quotation omitted).
8 To determine whether a specific instance of the use of force was
9 reasonable, courts balance "the nature and quality of the intrusion on
10 the individual's Fourth Amendment interests against the countervailing
11 government interests at stake." *Id.* (citing *Graham v. Connor*, 490 U.S.
12 386, 396 (1989)). Factors relevant to this inquiry include the severity
13 of the crime at issue, whether the suspect poses an immediate threat to
14 the safety of the officers or others, and whether he is actively
15 resisting arrest or attempting to evade arrest by flight." *Id.* The
16 Supreme Court has repeatedly cautioned that the reasonableness of an
17 officer's use of force "must be judged from the perspective of a
18 reasonable officer on the scene," and "must embody allowance for the fact
19 that police officers are often forced to make split-second judgments—in
20 circumstances that are tense, uncertain, and rapidly evolving." *Ryburn*
21 *v. Huff*, 565 U.S. ____, No. 11-208 (January 23, 2012) (per curiam)
22 (quoting *Graham*, 490 U.S. at 396-97).

23 On the record before it, the Court finds that Officer Myers and
24 Deputy Hally's use of force was objectively reasonable under the
25 circumstances. The fact that Mr. Miller was actively resisting arrest
26 by refusing to let go of his steering wheel justified the officers' use

1 of force, and there is no indication that the officers exceeded the scope
2 of what was justified under the circumstances, namely, force sufficient
3 to break Mr. Miller's grip on the wheel. Furthermore, the fact that Mr.
4 Miller had a firearm within arm's reach and refused to display its breech
5 to Officer Myers gave rise to the officers' reasonable concern for their
6 own safety and injected exigency into the situation. Finally, while Mr.
7 Miller has suffered real trauma, injury, and distress as a result of this
8 incident, nothing in the record indicates that his injuries were caused
9 by anything but the energy released when the three struggling men were
10 suddenly loosed from the pickup truck. In sum, while the manner in which
11 Mr. Miller was arrested represents a significant and indeed distressing
12 intrusion on his personal liberties, that intrusion is outweighed by the
13 interest of the officers in safely and expeditiously carrying out their
14 duty. Accordingly, the Millers' excessive force claim fails as a matter
15 of law, and the Court grants Defendants' motion in this regard.

16 **iii. False Arrest, False Imprisonment, and Malicious**
17 **Prosecution Claims**

18 The Millers have asserted state-law claims for false arrest, false
19 imprisonment, and malicious prosecution. Under Washington law, probable
20 cause for an arrest is a complete defense to all three of these causes
21 of action. See *Hansen v. City of Snohomish*, 121 Wn.2d 552, 563 (1993)
22 ("As with an action for malicious prosecution, probable cause is a
23 complete defense to an action for false arrest and imprisonment." (citing
24 *Bender v. Seattle*, 99 Wn.2d 582, 592 (1983))). Whether the Millers' false
25 arrest, false imprisonment, and malicious prosecution claims must be
26

1 dismissed thus turns on whether Officer Myers had probable cause to
2 arrest Mr. Miller.

3 Probable cause to arrest "exists where the facts and circumstances
4 within the arresting officer's knowledge of which the officer has
5 reasonably trustworthy information are sufficient to warrant a person of
6 reasonable caution in a belief that an offense has been committed." *State*
7 *v. Terranova*, 105 Wn.2d 632, 643 (1986) (citing *State v. Gluck*, 83 Wn.2d
8 424, 426-27 (1974)); *State v. Braun*, 11 Wn. App. 882, 884-85 (1974)). A
9 "bare suspicion of criminal activity" does not give an officer probable
10 cause to arrest. *Terranova*, 105 Wn.2d at 643.

11 Here, Officer Myers had probable cause to believe Mr. Miller
12 committed a number of crimes. First, Mr. Miller refused to comply with
13 Officer Myers' requests that he identify himself and open the breech of
14 his rifle, which is *prima facie* evidence of the crime of unlawful
15 avoidance of a field inspection. See RCW 77.15.470(1) ("A person is
16 guilty of unlawfully avoiding . . . field inspections if the person fails
17 to . . . [p]roduce for inspection upon request by a fish and wildlife
18 officer . . . [h]unting or fishing equipment."). And Mr. Miller's
19 refusal to comply with Officer Myers' repeated requests that he open the
20 breech of his rifle provided probable cause that Mr. Miller possessed a
21 loaded firearm in a motor vehicle, which is a crime under Washington law.
22 RCW 77.15.460(1)(a). Accordingly, because Officer Myers had probable
23 cause to arrest Mr. Miller, and the Millers' claims for false arrest,
24 false imprisonment, and malicious prosecution must be dismissed.

25 //

26 /

1 **iv. Assault and Battery Claim**

2 Under Washington law, law enforcement officers are entitled to
3 qualified immunity from assault and battery claims if their use of force
4 is reasonable under the circumstances. *Brooks v. City of Seattle*, 599
5 F.3d 1018, 1031 (9th Cir. 2010) (citing *McKinney v. City of Tukwila*, 103
6 Wn. App. 391 (2000)); see also RCW 9A.16.020(1) (use of force not
7 unlawful "[w]hen necessarily used by a public officer in the
8 performance of a legal duty. . . ."). Accordingly, for the reasons
9 expressed in II.B.iii., *supra*, the Court grants Defendants' motion with
10 regard to the Millers' assault and battery claim.

11 **v. Negligent Training and Supervision Claim³**

12 The Millers have also asserted a claim for negligent training and
13 supervision. To establish a claim for negligence, a plaintiff must show
14 that the defendant owed a duty of care, the defendant breached that duty,
15 injury resulted, and that the defendant's breach was the proximate cause
16 of the injury. *Hutchins v. 1001 Fourth Ave. Ass'n*, 116 Wn.2d 217, 220
17 (1991). Liability for negligent supervision and training arises out of
18 the employment relationship and is predicated on the employer's
19 furnishing of places, things, or duties the employee uses to commit
20 negligent or intentional wrongs. *Peck v. Siau*, 65 Wn. App. 285, 294

21
22 ³ While the Millers' Amended Complaint does not include an explicit
23 claim for negligent training and supervision in its "Cause of Action"
24 section, the Court finds that when construed liberally, the Amended
25 Complaint's allegations in sections A.5. and A.6. set forth a claim for
26 excessive force. See ECF No. [8](#) at 2-3.

(1992). Here, the Millers have presented no evidence relating to a duty that Captain Whorton, the Department of Fish and Wildlife, or Asotin County owed to Mr. Miller, nor have the Millers presented any evidence regarding breach or proximate cause. Accordingly, the Court dismisses the Millers' negligent supervision and training claim and grants Defendants' motion in this regard.

C. Conclusion

For the reasons stated above, the Court finds that there are no genuine issues of material fact and that Defendants are entitled to judgment as a matter of law on all of the Millers' claims. As such, the Court grants Defendants' motions for summary judgment and dismisses the Millers' Amended Complaint.

III. The State Defendants' Counterclaim

The State Defendants asserted a claim under RCW 4.24.350, which provides a counterclaim for bringing a false, unfounded, or malicious action for malicious prosecution. ECF No. [12](#) at 6. However, the State Defendants have not pursued this counterclaim and have requested that this lawsuit be dismissed in their summary judgment materials. Accordingly, the Court dismisses the State Defendants' counterclaim.

For the reasons discussed above, **IT IS HEREBY ORDERED:**

1. The State Defendants' Motion for Summary Judgment, **ECF No. [54](#)**, and Motion to Join Asotin County's Motion to Dismiss Lavonne Miller, **ECF No. [71](#)**, are **GRANTED**.

2. The County Defendants' Motion for Summary Judgment, **ECF No. [59](#)**, is **GRANTED**.

3. This matter is **DISMISSED**.

1 4. Judgment shall be **ENTERED with prejudice** in Defendants' favor.

2 5. This file shall be **CLOSED**.

3 **IT IS SO ORDERED.** The District Court Executive is directed to enter
4 this Order and provide a copy to Plaintiffs and defense counsel.

5 **DATED** this 16th day of March 2012.

6
7 s/Edward F. Shea

8 EDWARD F. SHEA

9 United States District Judge
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

26 Q:\Civil\2010\360.MSJ.lc2.wpd